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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 363

CHARLES R. KING, Special Administrator of the Estate of Thomas C. Carroll, Deceased,
Petitioner,
vs.
NICHOLSON TRANSIT COMPANY,
a Michigan corporation,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINION BELOW

The opinion below (R. 152-158) of the Supreme Court for the State of Michigan on appeal is reported at 329 Mich. 586 on which rehearing was denied on June 4, 1951 (R. 181). There was no opinion in the Trial Court.

JURISDICTION

Our opponent's petition claims jurisdiction based on existence of a Federal question of substance under a Federal statute in a decision of the highest Court of the State of Michigan. The Federal statute is the Merchant Marine Act of June 5, 1920, Chapter 250, 46 U. S. C., §688, commonly known as the Jones Act. But respondent claims the federal question was not properly raised until motion for reargument below, which motion was denied without opinion.

QUESTIONS PRESENTED

1. Whether this Court will review the facts and evidence in a seaman's death case under the so-called Jones Act, Act of June 5, 1920, Chapter 250, §33, 41 Stat. 1007; 46 U. S. C. §688, where judgment based on a jury verdict in the lower Court for the plaintiff was set aside by the Supreme Court of the State of Michigan for lack of evidence of negligence or causation and because it was based on speculation and conjecture; where there is nothing of general importance or novelty, no Federal question of substance, and clearly no direct conflict with prior decisions involved.

2. Whether the petition heretofore filed by petitioner accurately presents the matter involved, whether the Federal question here presented was presented below with particularity and definiteness, and whether the same Federal questions now presented here were timely presented below on appeal and on motion for reargument below.

STATUTE INVOLVED

Our opponents brought their action under Section 33 of the Merchant Marine Act of 1920, Act of June 5, 1920, Chapter 250, 41 Stat. 988, 46 U. S. C. §688, the so-called Jones Act.

STATEMENT OF THE CASE

On December 31, 1945, Thomas Carroll, petitioner's decedent, was in the employ of respondent as a porter in the steward's department of the Steamer *James Watt*, a conventional Great Lakes bulk freighter owned and operated by respondent, Nicholson Transit Company. On said date the Steamer *James Watt* was in the dry dock of Great Lakes Engineering Works at River Rouge, Michigan, and at approximately 5:40 P. M. the decedent was fatally injured by a fall to the bottom of the dry dock (R. 33). A gangplank furnished by the dry dock owner ran from the deck of the ship to the top of the dry dock, this gap being estimated at 17 to 18 feet by the witnesses (R. 22). The actual gangplank length including overlaps on both ends may have been 24 feet long (R. 69). The record does not disclose whether decedent fell from the ship's deck (as to whose condition the record is barren), the gangplank, or the top of the shipyard's dry dock wall (for which respondent would probably not be responsible). The nearest thing to an eye-witness, Grant, the shipyard watchman, testified he did not see the deceased on the gangplank (R. 34). He did see his body falling halfway down (R. 33), and a little nearer the boat than the dry dock (R. 32).

Petitioner's hypothesis is that his decedent was on the gangplank, that the gangplank was defective and contained ice and snow, that his decedent fell from the gangplank, and that the defective condition of the gangplank was the proximate cause of the decedent's precipitation to the bottom of the dry dock and resulting death. Respondent contends there was not sufficient evidence to go to the jury on any of these points.

The case was brought under the Jones Act and, consequently, the gravamen of the matter is negligence on the part of respondent. Plaintiff's Count II for inadequate medical attention was stricken by the Trial Court as not proved (R. 120). Also the evidence of the only witness who placed snow on the gangplank and considerable slack in the rope railing was stricken by the Trial Court as too remote in point of time (Supplemental Record on Appeal, pp. 2-3). In the Trial Court respondent moved for a directed verdict at the close of petitioner's proofs, and the Trial Court reserved its decision thereon under Section 14531, et seq. of the Michigan Compiled Laws of 1929, as amended (Mich. St. Ann. 27.1461, et seq.), and submitted the case to the jury, who returned a verdict for petitioner in the sum of $8,000.00. Respondent then renewed its motion for a judgment notwithstanding the verdict and this was denied without opinion (R. iv). Upon appeal to the Supreme Court for the State of Michigan, the Trial Court's judgment was reversed and vacated and judgment was entered for respondent (R. 157-8). Petitioner then filed motion for a rehearing, which motion was subsequently denied without opinion on June 4, 1951. Subsequently petition for writ of *certiorari* to the Supreme Court for the State of Michigan was filed here by plaintiff-appellant below.

It is doubtful if our opponent's petition fairly and accurately discloses the essential facts and the questions in-

volved, and this Court may well consider the petition fatally defective in this respect alone. *O. E. Sutter, et al. v. Midland Valley Railroad Co.*, 280 U. S. 521, 50 S. Ct. 65; *Southern Power Co. v. N. Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164.

For example, the petition states flatly on page 2 that "testimony of witnesses established directly, or permitted an inference to be drawn * * * that the gangplank was unsafe * * * because of * * * its worn cross cleats." But there is *no testimony whatsoever* to this effect and none appears at the pages cited, 26 and 88 of the record. Nor is there any basis for inference to that effect. Reference to the Record citations indicates this clearly. The only place it appears is in *Petitioner's pleadings.*

The testimony by Schultz "as to the condition of the gangplank or the rope at the time he observed it" and how he felt and what he observed at that time was stricken out by the Trial Judge on account of "its remoteness from the time of the accident" (Suppl. R. 2-3). The petition also refers to the "possibility of dangerous vibration" over the 24 feet of the gangplank's length. This appears only in plaintiff's *pleading, but not in the evidence.* The actual gap between the ship's dock and dry dock was estimated by various witnesses, but the greatest distance testified to was 17 or 18 feet (R. 22, 36, 43, 59). The balance of the gangplank's length was apparently overlap (R. 22).

The petition states the angle of the gangplank was "in *excess* of 25 degrees from the horizontal" (Pet., p. 2). This is incorrect, unsupported in the evidence and misleading.

To support the petition's statement that the gangplank was an "unsafe appliance" because of its sagging rope railing, record citations are given at pages 38, 39 and 88.

These pages reveal only testimony of a 1 or 2 inch sag. In a railing which was 3 feet high! (R. 36).

To support the statement in the petition, page 2, that "decedent * * * fell * * * *from the ship's gangplank* * * * while attempting to leave the ship * * *," the petition refers (among others) to page 4 of the record, i.e., to *plaintiff's pleading:* No witness saw deceased on the gangplank at any time.

To support the statement the gangplank was "inadequately lighted," (Pet., p. 2) reference is made to page 33, where the witness, petitioner's own witness Grant, indicated it was neither "light" nor "dark" but "dusk" (R. 33), but *the same witness testified the lights were on* (R. 47).

To support the statement (Pet., p. 2) that the gangplank "was permitted to accumulate ice and snow," page 20 of the testimony is cited. But practically all of this was stricken out subsequently by the Trial Judge as too remote (Suppl. R. pp. 2-3). Page 63 of the record is also cited where it appears that there was a heavy snow six hours *after* the accident. The record at 63 and 64 merely shows the mate did not recall whether the gangplank was swept or cinders put on. The jury's possible disbelief of a witness cannot substitute for proof otherwise lacking.

The Weather Bureau testimony referred to (R. 99, 102) showed less than 1/10 of an inch of snow had fallen in the *nine* hours prior to the accident (R. 102-3) and any amount on the gangplank would be negligible in view of the 12 to 15 mile wind (R. 103).

All the unstricken testimony produced by the petitioner (plaintiff below) directly relating to the condition of the gangplank was that the gangplank was free of ice and snow and in good safe condition (R. 37, 45, 61, 68, 85) and dry (R. 85).

In view of the above, the petition appears to be defective as not accurately and fairly representing the case and the facts.

Respondent seriously questions the propriety of petitioner attempting to incorporate by reference his brief in the Court below on petition for reargument below. *Live Oak Water Users v. Railroad Commission of California*, 269 U. S. 354, 46 S. Ct. 149. This clearly is not a compliance with Rules 38, 26 and 27 of this Honorable Court.

Without the other pertinent briefs below being before this Court, including respondent's reply to application for rehearing, it places counsel for respondent in the dilemma of whether or not to answer both the brief which petitioner has incorporated directly within the petition and the additional 18-page brief below which this Court may or may not consider.

ARGUMENT

POINT I:

REASONS THE PETITION SHOULD BE DENIED

A. THE FEDERAL QUESTION NOW ASSERTED OF ARBITRARY DEPRIVATION OF PETITIONER'S RIGHT TO A JURY TRIAL UNDER THE JONES ACT WAS NOT TIMELY RAISED IN THE COURT BELOW, NOR WITH PARTICULARITY AND DEFINITENESS.

The Supreme Court of Michigan entered its judgment for defendant on March 1, 1951 (R. 157-8). Up to that time petitioner appears to have failed to present to that Court any of the five reasons now relied on for the granting of the writ (Pet., p. 8) and made no claim that he would be

deprived of a federal right and of a jury trial granted by the Jones Act, or that a new trial should have been granted, or that the Appellate Court (Supreme Court of Michigan) must weigh the evidence in order to enter judgment for defendant below (respondent here). Nor did he claim that the Michigan Supreme Court would be adopting a federal rule of evidence expressly repudiated by this Court (if it should reverse the Trial Court on the grounds the verdict was unsupported by the evidence and based on conjecture and speculation). All these claims, however, are now asserted in the petition herein. There was no citation in the brief for appellee below (petitioner here) of the cases relied on now by petitioner here such as *Wilkerson v. McCarthy,* 336 U. S. 53, nor *Hust v. Moore-McCormack Lines,* 328 U. S. 707, nor *Lavender v. Kurn,* 327 U. S. 465, nor *Carter v. Atlanta St. A. Bay Rwy. Co.,* 338 U. S. 430.

Forty days later, *on a motion for rehearing* (April 11, 1951, R. 150), petitioner first indicated to the highest Court of Michigan its claim that a federal rule of evidence was being followed by the Michigan Supreme Court which had been repudiated by this Court. No "surprise" was involved because the case of *Chicago Ry. Co. v. Coogan,* 271 U. S. 472, was quoted at length in respondent's initial brief on appeal below (as appellant below). Even at that time no argument or claim was made that petitioner here would be arbitrarily deprived of a federal right by a reversal by the Michigan Supreme Court, or that a new trial should have been granted. Nor was it clearly argued then as it is in the petition that the Appellate Court was in effect "weighing the evidence."

The argument even on the motion for rehearing merely was, and the cases cited held, that even though questions of fact be disputed, doubtful or close, they still are for the jury, and that an erroneous federal rule of evidence

was adopted by the Michigan Supreme Court's judgment which had since been expressly repudiated by this Court (pp. 1 and 13).

Thus this Court's rule requiring that the same federal question presented in the petition must have been properly presented to the highest State Court was not satisfied by the motion for rehearing. The motion for rehearing was denied without opinion (R. 181).

More important, however, is this Court's rule that the raising of the federal question for the first time in a petition for rehearing in the highest State Court is insufficient.

In *Godchaux Co., Inc. v. Estopinal, et al.*, 251 U. S. 179, 40 S. Ct. 116, this Court stated:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner, and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point. *Mutual Life Insurance Co. v. McGrew*, 188 U. S. 291, 308, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33; *St. Louis & San Francisco R. R. v. Shepherd*, 240 U. S. 240, 36 Sup. Ct. 274, 60 L. Ed. 622; *Missouri Pacific Ry. Co. v. Taber*, 244 U. S. 200, 37 Sup. Ct. 522, 61 L. Ed. 1082" (p. 181).

In *Simmerman v. State of Nebraska*, 116 U. S. 54, 6 S. Ct. 33 this Court stated:

> "It nowhere appears from this record, * * * that any federal question was actually presented for consideration, or in any way relied on, before the final judgment from which the writ of error has been taken. Such being the case we cannot take juris-

diction (citing cases). The fact that after the final judgment, and in the petition for a writ of error to this Court, which seems to have been treated also as a petition for rehearing, a federal question was presented, is not enough. * * * As we said in that case: 'we act on the casé as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests' " (p. 54).

This rule of law apparently still stands. *American Surety v. Baldwin*, 287 U. S. 156, 53 S. Ct. 98; *Consolidated Turnpike Co. v. Norfolk & Ocean View R. R.*, 228 U. S. 326, 33 S. Ct. 510; *Herndon v. State of Georgia*, 295 U. S. 441, 55 S. Ct. 794; *Radio Station WOW v. Johnson*, 326 U. S. 120; 65 S. Ct. 1475.

The burden of proof appears to be on petitioner to show the federal question now complained of here was properly raised below and with particularity and definiteness. *Chicago, Indianapolis & Louisville R. Co. v. Louisville Railway Co.*, 196 U. S. 128, 25 S. Ct. 200; *McGarrity v. Delaware River Bridge Commission*, 292 U. S. 19, 54 S. Ct. 565; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 17 S. Ct. 709; *Sayward v. Denny*, 158 U. S. 180, 15 S. Ct. 777. This the petitioner fails to do and is unable to do.

B. THE PETITION FAILS TO DISCLOSE WHY THIS COURT SHOULD RE-EXAMINE THE PARTICULAR FACTS HERE INVOLVED AND TO GIVE THIS PARTICULAR LITIGANT ANOTHER HEARING.

Surely this Court cannot reexamine the facts and evidence in each Jones Act Case to redetermine whether the evidence on negligence, proximate cause, etc. is sufficient.

C. NO IMPORTANT PRINCIPLE OR PRECEDENT IS INVOLVED. NOR IS A NOVEL QUESTION PRESENTED.

The application of general principles to a particular set of facts is involved.

D. THE PETITION SEEMS TO ASSUME THAT A NEW RULE IS NOW IN EFFECT THAT A JURY VERDICT IS INVIOLATE AND NOT SUBJECT TO ANY CORRECTIVE ACTION BY THE COURTS EVEN THOUGH NOT REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE, IF THE ACTION HAPPENS TO BE BROUGHT UNDER THE JONES ACT.

This would give the jury in these cases powers similar to those given it in some state condemnation proceedings. No such rule appears to have been established by this Court.

E. NO CONFLICT OF DECISION ACTUALLY IS SHOWN BY THE PETITION, NOR IS A FEDERAL QUESTION OF SUBSTANCE INVOLVED.

No decision not in accord with prior decisions of this Court is demonstrated. Nor in fact is error of law demonstrated in the court below.

F. EVEN IF ERROR IN REASONING SHOULD APPEAR BELOW, THE DECISION WAS CORRECT AS THE EVIDENCE WAS WHOLLY INSUFFICIENT TO AFFORD A REASONABLE BASIS OF SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT ON EITHER NEGLIGENCE OR PROXIMATE CAUSE.

POINT II:

THE DECISION OF THE SUPREME COURT OF MICHIGAN WAS NOT CONTRARY TO APPLICABLE DECISIONS OF THIS COURT AND WAS NOT ERRONEOUS

A Repudiated Rule of Federal Evidence Was NOT Relied On

The petition creates a ghost. It sets up a straw man and then mows him down.

Much is said in the petition about "a repudiated federal rule of evidence (*Chicago, M. & S. P. Ry. Co. v. Coogan*, 271 U. S. 472)," (Pet. p. 4). It is urged by petitioner (Pet. p. 4), and this is the real basis of his petition, that this "rule of evidence * * * has been expressly overruled by this Honorable Court."

Let's examine what rule of evidence was adopted by the Court below from the *Coogan* case (*cit. supra*). The legal proposition which the Michigan Supreme Court quoted from the *Coogan* case was as follows:

> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521. 524 (45 S. Ct. 169, 69 L. Ed. 419) * * *" (R. 156).

This proposition clearly appears to be the law today. Also quoted in the opinion below was a discussion of the particular facts from the *Coogan* opinion:

> * * * When the evidence and the conclusion which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pawling v. United States*, 4 Cranch (8 U. S.) 219, 221 (2 L. Ed. 601); *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663 (21 S. Ct. 275, 45 L. Ed. 361); *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, (26 S. Ct. 303, 50 L. Ed. 564); *St. Louis & Iron Mountain & S. R. Co. v. McWhirter*, 229 U. S. 265, 282 (33 S. Ct. 858, 57 L. Ed. 1179); *St. Louis-San Francisco R. Co. v. Mills*, 271 U. S. 344 (46 S. Ct. 520, 70 L. Ed. 979), decided May 24, 1926" (R. 156-7).

Even though this Court may have criticized the application of the broad principle to the facts in the *Coogan* case, the question remains: Has the principle stated in the first quotation above been expressly overruled by this Court? It appears clearly that it has not been overruled.

Wilkerson v. McCarthy, 336 U. S. 53, is apparently the case on which petitioner relies when he states that the decision of the *Coogan* case, *supra*, has "been expressly challenged" (Pet., p. 5). This Honorable Court there held, six to two, that the Supreme Court of Utah had erred in affirming the action of a lower court that had taken the case from the jury and directed a verdict for the defendant. The majority opinion was delivered by Mr. Justice Black. Mr. Justice Frankfurter delivered a concurring opinion stating the Court should limit its docket to "cases that demand adjudication on the basis of importance to the operation of our federal system" and eliminate cases which turn merely on an appraisal of evidence. Mr. Justice Burton concurred in that opinion. Mr.

Justice Douglas also wrote a concurring opinion analyzing this Court's attitude toward Federal Employers' Liability Act cases and criticizing by inference the result in the *Coogan* case (cit. *supra*). (It should be remembered that in the *Coogan* case this Court reversed the appellate Court below in order to hold here that the jury verdict was not supported by the evidence.) Mr. Justice Murphy and Mr. Justice Rutledge joined in that opinion. On the other hand, Mr. Chief Justice Vinson dissented on the ground that the evidence when viewed in the light most favorable to the plaintiff could not sustain a plaintiff's verdict. Mr. Justice Jackson dissented suggesting the trend of this Court, if it followed the majority opinion, was toward making an employer an insurer in Federal Employers' Liability Act cases.

In the *Wilkerson* majority opinion there is no "express repudiation" of the general principle adopted from the *Coogan* case by the Michigan Supreme Court in the case at bar and quoted above. In fact the majority opinion in the *Wilkerson* case, cited *supra*, did not mention the *Coogan* case, *cit. supra*.

Jones Act actions still are bottomed on negligence. Proximate cause still is an element of plaintiff's case. There is no peculiar magic or mystery about the jury's verdict in these cases. They still must be supported by the required minimum of evidence.

A fairly recent decision of this Court, *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, decided February 26, 1951, clearly indicates that the law still requires proof of negligence on the part of the employer. In that case Mr. Justice Minton, in the majority opinion, said:

> "To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32" (p. 575).

and:

> "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the engineer's testimony that he stopped after —indeed, because of—the fall, then there is no evidence as to when decedent fell. There would be still be a failure of proof.
>
> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway v. United States*, 319 U. S. 372, 395" (pp. 577-8).

This Honorable Court since *Wilkerson v. McCarthy*, 336 U. S. 53, and *Lavender v. Kurn*, 327 U. S. 465, has denied application for *certiorari* in some situations where the case below was taken away from the jury for insufficiency of evidence. In *Trust Co. of Chicago v. Erie R. Co.*, a writ of *certiorari* was denied by this Court, 334 U. S. 845, 68 S. Ct. 1513, 92 L. Ed. 1769, where the question below arising under the Federal Employers' Liability Act was whether there was sufficient evidence of negligence for the jury. Mr. Justice Minton, then serving as Circuit Judge, delivered the opinion below reported at 165 F. (2d) 806 (C. C. A. 7), stating:

> "* * * It is all speculation as to the manner in which the decedent met his death. That is the trouble with the plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable

hypotheses as to how the accident happened may be conjured, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn * * * (p. 809).

"A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was that the defendant did that was negligent and caused the accident. If there is some conflict in the evidence as to what the defendant did or did not do, which it should or should not have done, there may be a conflict for a jury to resolve, as was stated in *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916. In our case, there is no conflict in the evidence. There is a woeful lack of evidence, which would leave a jury to nothing but speculation. *The Supreme Court has recently said that where the jury is left to speculation only, the trial court must step in and direct a verdict.* In *Galloway v. United States*, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458. the Court, still adhering to the right of the trial court to direct a verdict when there is only speculation to be indulged in by the jury, said: 'Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.'" (Italics by Counsel.) (pp. 809-810.)

The petition carefully refrains from setting forth the actual unstricken testimony re negligence and proximate cause. Instead page 2 is filled up with "inferences". With good reason! The *actual unstricken material evidence on these issues* could be summarized in less than ¼ page.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

SPARKMAN DEATS FOSTER,
Counsel for Respondent.